

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1295

To be argued by
ROBERT N. SHWARTZ

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1295

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERNEST MALIZIA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America*

ROBERT N. SHWARTZ,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

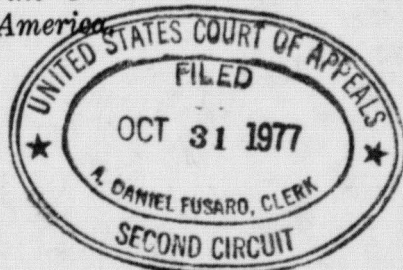


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	3
ARGUMENT:	
POINT I—The Trial Judge Properly Refused to Permit the Defendant's Fellow Prisoner to Represent Him	3
POINT II—Defendant Was Not Denied His Right to Compulsory Process, Nor was His Right to Decide to Testify in his Own Behalf Impaired ..	5
POINT III—There Is No Merit To Defendant's Claim that the Trial Should Have Been Transferred to Another Judge or District	7
CONCLUSION	9

TABLE OF CASES

<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269 (1942)	4
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972)	3
<i>Cheff v. Schnackenberg</i> , 384 U.S. 373 (1966)	1
<i>Ennis v. LeVre</i> , Dkt. No. 76-2155, slip op. 5205 (2d Cir. Aug. 9, 1977)	4, 6
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	3

	PAGE
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	3
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	3
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	3
<i>United States v. Araujo</i> , 539 F.2d 287 (2d Cir. 1976)	8
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir. 1977)	8
<i>United States v. Cyphers</i> , 556 F.2d 630 (2d Cir. 1977)	4
<i>United States v. Fuentes</i> , Dkt. No. 77-1083, slip op. 5883 (2d Cir. Sept. 14, 1977)	4
<i>United States v. Hinderman</i> , 528 F.2d 100 (8th Cir. 1976)	4
<i>United States v. Rodriguez</i> , 556 F.2d 638 (2d Cir. 1977)	6
<i>United States v. Wolfish</i> , 525 F.2d 457 (2d Cir. 1975), <i>cert. denied</i> , 423 U.S. 1059 (1976)	4
<i>United States ex rel. Konigsberg v. Vincent</i> , 526 F.2d 131 (2d Cir. 1975)	5

OTHER AUTHORITIES

ABA Standards Relating to the Defense Function § 5.2(b)	6
Title 18, United States Code, Fed. R. Crim. P. Rule 21(a)	8
Title 18, United States Code, Section 1(3)	1
Title 18, United States Code, Section 7	2
Title 18, United States Code, Section 113(d)	1
Title 28, United States Code, Section 144	8

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1295

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERNEST MALIZIA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ernest Malizia appeals from a judgment of conviction entered on June 16, 1977 in the United States District Court for the Southern District of New York after a one-day bench trial before the Honorable Milton Pollack, United States District Judge.

Information 77 Cr. 402, filed May 31, 1977, charged Malizia with assault by striking his attorney, Joseph I. Stone, within the special territorial jurisdiction of the United States, in violation of Title 18, United States Code, Section 113(d).

On June 14, 1976, Judge Pollack heard the evidence and returned a verdict of guilty.*

* Since the offense committed here was a petty offense carrying a maximum term of imprisonment of six months, the defendant was not entitled to a trial by jury. *Cheff v. Schnackenberg*, 384 U.S. 373, 378-79 (1966). See also 18 U.S.C. § 1(3).

On June 16, 1977, Malizia was sentenced to a term of six months' imprisonment concurrent with his other federal terms of imprisonment.*

Statement of Facts

The Government's Case

The Government called two eyewitnesses to establish that on May 2, 1977, while on trial before the Honorable Irving Ben Cooper and a jury on Indictment 75 Cr. 687, the defendant assaulted his attorney, Joseph I. Stone. Mr. Stone was struck in the face, his suit sleeve was torn and Deputy United States Marshals were required to pull the defendant off his attorney. The assault took place in Courtroom 307 of the United States Courthouse for the Southern District of New York at Foley Square, New York, New York.**

* On March 19, 1974 a ten year term of imprisonment and a \$20,000 fine was imposed on Malizia by Judge Constance B. Motley upon Malizia's conviction on Indictment 74 Cr. 150, charging him with participation in a narcotics conspiracy. On May 5, 1977, Judge Henry F. Werker imposed five year sentences on Malizia upon his convictions on Indictment 74 Cr. 1018 charging him with escape and bribery. These sentences were imposed concurrent with each other, but consecutive to Judge Motley's sentence. On June 15, 1977, Judge Irving Ben Cooper imposed an additional fifteen year term of imprisonment to be followed by six years' special parole term and a \$25,000 fine for Malizia's conviction on Indictment 75 Cr. 687 charging him with participation in a heroin conspiracy. This sentence was consecutive to Judges Motley's and Werker's sentences.

** The defendant conceded that the United States Courthouse at Foley Square is within the special territorial jurisdiction of the United States, as defined in Section 7 of Title 18, United States Code. (Tr. 2-3).

References to the trial transcript are abbreviated herein as "Tr."; references to the pretrial conference of June 10, 1977 are abbreviated herein as "P.Tr."; references to appellant's brief are abbreviated as "Br."

Richard Marmaro, law clerk to Judge Cooper, and Michael R. O'Neill, Deputy United States Marshal, testified that they were in Courtroom 307 on May 2, 1977. (Tr. 4, 29). Each, from his own vantage point, observed the defendant turn and attack his attorney after Judge Cooper had denied the defendant's vocal and disorderly attempt to read a document into the record. (Tr. 5-8, 30-33).

The Defense Case

No witnesses testified on the defendant's behalf. The defendant offered no documentary evidence.

ARGUMENT

POINT I

The Trial Judge Properly Refused to Permit the Defendant's Fellow Prisoner to Represent Him.

On June 10, 1977, the originally scheduled trial date, the defendant requested that his appointed attorney be relieved and replaced by Harold Konigsberg, an inmate at the Metropolitan Correctional Center. Konigsberg is not, and never has been, a member of the bar. Apparently, his only experience with the criminal law has been as a defendant. Judge Pollack properly denied the defendant's application. (P. Tr. 4-6).

It is well settled that a defendant has the right to the effective assistance of counsel at all critical stages of a criminal prosecution. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932). It is also well settled that a defendant may choose to represent himself. *Faretta v.*

California, 422 U.S. 806 (1975); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). These precedents do not extend to a defendant the right to select anyone to represent him. See, e.g., *United States v. Hinderman*, 528 F.2d 100, 103 (8th Cir. 1976) (no right to be represented by unlicensed attorney). This much appellant concedes. (Br. 3).

Instead Malizia argues that the trial court abused its discretion in refusing to allow some form of "hybrid" representation. This argument overlooks the fact that the trial court was never asked to permit any "hybrid" representation; Malizia's only application was to have Konigsberg represent him as "counsel" of his choice. (P. Tr. 4). Thus, any claim that the District Court erred in denying "hybrid" representation must be defeated by Malizia's own failure to request this relief. *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883, 5890 (2d Cir. Sept. 14, 1977).

Even if Malizia had requested that he be permitted to proceed *pro se* with Konigsberg as co-counsel, the request would have been properly denied. The right to proceed *pro se* cannot be exercised simultaneously with the right to counsel. *Ennis v. LeVre*, Dkt. No. 76-2155, slip op. 5205, 5211 (2d Cir., Aug. 9, 1977); *United States v. Cyphers*, 556 F.2d 630 (2d Cir. 1977); *United States v. Wolfish*, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). *A fortiori*, the District Court was not required to permit Malizia to appear *pro se* with a non-lawyer as co-counsel.

Malizia's final suggestion is that the District Court should have permitted Konigsberg to "sit in" as an advisor while retaining the services of appointed counsel. (Br. 3). Although a District Court, in its discretion, may permit a *pro se* defendant to receive advice from an attorney, *United States v. Wolfish*, *supra*, the District Court need not, and should not, permit a lay adviser for

a defendant already represented by counsel. This is particularly so here in view of Malizia's demonstrated propensity to disrupt the courtroom, and Konigsberg's own proclivity for disorderly displays, which have been recorded in the annals of this Court, *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 1111 (2d Cir. 1975).

POINT

Defendant Was Not Denied His Right to Compulsory Process, Nor was His Right to Decide to Testify in his Own Behalf Impaired.

Malizia contends that he was denied the right to subpoena witnesses in his behalf because the trial judge relied upon defense counsel's repeated statements that he desired to call no witnesses other than defendant. From this he argues further that his right to testify in his own behalf was impaired because the District Court insisted that if defendant wanted to testify, he had to take the witness stand when called as the sole defense witness. The record shows that defendant's rights to subpoena witnesses and to testify at trial vigorously were protected at all stages of the proceeding.

In fact, defense counsel received the trial court's assistance in the production of the only witnesses for whom production was requested. On the morning of June 10th, the originally scheduled date for trial, Mr. Brenner, Malizia's counsel, requested that Joseph Stone be subpoenaed as a defense witness. Mr. Brenner specifically declined to request the production of any other witness at that time. (P.Tr. 9-10). Pursuant to the trial judge's direction, Mr. Stone appeared later that day and conferred with both Mr. Brenner and the defendant. At two o'clock, Mr. Brenner advised the trial court that he needed further time to interview various other poten-

tial witnesses to the alleged assault. (P.Tr. 11-13). Judge Pollack thereupon granted an adjournment of the trial until June 14, 1977, and signed an order directing the Commissioner of Jurors to provide defense counsel with a list of the jurors empanelled in the case of *United States v. Ernest Malizia*, 75 Cr. 687, their addresses and telephone numbers.*

Thereafter, during the trial on June 14, 1977, after the Government had rested, defense counsel advised Judge Pollack that he had spoken with several jurors and had concluded that there were no witnesses whom he wished to call other than the defendant. Mr. Brenner specifically chose to request no further subpoenas, and clearly indicated that he had given careful and thorough consideration to the proper course for the defense to take. (Tr. 40-44).

Malizia now argues that his obvious disagreement with defense counsel's strategy should have taken precedence over the tactical decision of his lawyer. The law is clear, however, that once defendant requested and received representation by assigned counsel, tactical decisions such as what witnesses to call—apart from the defendant himself—were left to the sound judgment of the attorney. See, ABA Standards Relating to the Defense Function § 5.2(b); *Ennis v. LeVre*, *supra*; *United States v. Rodriguez*, 556 F.2d 638 (2d Cir. 1977). And, in this case it is clear that counsel fairly and properly exercised his judgment. None of the earlier trial jurors had observed the assault charged in the indictment. Defendant did not indicate any possible way that either Judge Cooper or the prosecutor at the earlier trial could

* Earlier in the week, the Assistant United States Attorney had provided defense counsel with a list of all persons known by the Government to have been in Courtroom 307 during the time of the assault. (P.Tr. 14).

have provided a meaningful defense,* and the record makes clear that defendant's personal desire to call them as witnesses was no more than an attempt to interrupt and interfere with the orderly course of the then on-going trial.

Finally, defendant's claim that the trial court abridged his right to testify simply is not supported by the record. Once defense counsel stated that the only witness to be called for the defense was Malizia, himself, Judge Pollock gave defendant repeated opportunities to assume the witness stand. Instead, when defendant specifically was asked if he wished to testify in his own behalf, as urged by his trial counsel, defendant obstinately refused to answer and remained seated. (Tr.). It is manifest that Malizia fully understood that the time had arrived for him to testify, and his steadfast refusal to testify at that point was attributable to no one's decision but his own.

POINT III

There Is No Merit To Defendant's Claim that the Trial Should Have Been Transferred to Another Judge or District.

For the first time on appeal, defendant suggests that the trial judge in some way was prejudiced against him because the offense took place before a fellow member of the District Court. Upon this claim, Malizia argues that the case necessarily should have been transferred to another judge or another district. This contention was

* Judge Cooper had stated his observations of the assault on the record immediately after its occurrence. Defense counsel received ample opportunity to review Judge Cooper's statement on the record. Judge Cooper's statement leaves no doubt that his testimony would not have aided the defense.

waived by defendant's failure to raise it in the trial court, and, in any event, is without merit.

At no time prior to or during the trial did defendant move for Judge Pollack's recusal or a transfer of the case to another District Court.* Malizia's failure to have made such a motion in the trial court amounts to a waiver and precludes assertion of this claim on appeal. *United States v. Braunig*, 553 F.2d 777, 780-81 (2d Cir. 1977); *United States v. Araujo*, 539 F.2d 287, 290-91 (2d Cir. 1976).

Moreover, Malizia has not suggested even in this Court any sufficient reason to have required either the recusal of the trial judge or a transfer of the case. The offense proved at trial involved an assault on a lawyer which happened to have occurred before another judge in the same district. There simply was nothing about this offense which would have given rise to either personal bias or extraneous influence on Judge Pollack or any other member of the District Court. Judge Pollack fully and fairly protected defendant's interests at trial and rendered a verdict against Malizia solely on the basis of the overwhelming and compelling proof of his guilt. In short, there was no reason why the trial could not take place before Judge Pollack in the Southern District, and defendant's belated claim to the contrary therefore must be rejected.

* The proper course for presenting a motion for recusal is set forth in 28 U.S.C. § 144. The request for a transfer of venue should have been made under the standards recited in Rule 21(a), Fed. R. Crim. P.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ROBERT N. SHWARTZ,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Robert N. Shwartz being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 31st day of October, 1977,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Mr. Paul S. Brenner, Esq.
350 Fifth Avenue
New York, N.Y. 10001

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Robert N. Shwartz

Sworn to before me this

31st day of October, 1977
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6703450 Qualified in Kings Co.
Commission Expires March 30, 1978